DEAN R. KARLBERG

IBLA 85-444 Decided July 6, 1987

Appeal from a decision of the California Desert District Office, Bureau of Land Management, requiring payment of rental and monitoring fees in right-of-way application C-13787.

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

   Where a right-of-way applicant was charged $375 for 5 years use of a linear road right-of-way, contrary to provision of a Bureau of Land Management Instruction Memorandum requiring that new linear rights-of-way should be charged a minimum rental of $25 for 5 years pending final approval of regulations implementing a uniform system of appraisal for such rights-of-way, the decision establishing the $375 rate must be vacated.
2. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

   Where there is an indication in the case file that a road for which an application for a right-of-way has been made may be an existing public highway, a decision establishing a rental charge for use of the right-of-way is vacated and the casefile remanded for further fact-finding to determine whether the road right-of-way is properly subject to any rental charge.

APPEARANCES: Dean R. Karlberg, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Dean Karlberg has appealed from a January 24, 1985, decision of the California Desert District, Bureau of Land Management (BLM). BLM's decision required payment in advance of $375 for rental of right-of-way CA-13787 together with a monitoring fee of $40, for a total payment of $415.

On April 11, 1983, appellant filed right-of-way application CA-13787 for the use of an existing road for ingress and egress to his property which

is surrounded by public lands. The right-of-way is 30 feet wide and approximately 2 miles in length, traversing secs. 21, 28, 33 and 34, T. 37 S., R. 40 E., Mount Diablo Meridian, California. By letter dated September 6, 1984, BLM transmitted a proposed right-of-way grant for signature and requested an advance rental payment of $375 for the first 5 years and also informed appellant of a monitoring fee of $40 to be paid simultaneously. On January 24, 1985, BLM issued a second decision allowing appellant 30 days to return the signed right-of-way grant and submit the rental payment and monitoring fee or suffer rejection of the application. On February 25, 1985, appellant filed a notice of appeal from BLM's decision. 1/

In his statement of reasons appellant indicates he was led to believe that there would be only a one-time fee for the right-of-way and, in addition, appellant challenges the monitoring fee. He states that a monitoring fee is improper because "there is nothing to monitor" as the road is already in existence. Finally appellant states that his primary concern is that in order to qualify for a loan at a lending institution, he must show a recorded easement giving access to his property, and states that a lease will not meet his needs.

[1] This appeal concerns application for a linear road right-of-way, a matter governed by the provisions of Departmental regulations appearing at 43 CFR Part 2800, rules which currently are undergoing revision. See 51 FR 31886 (Sept. 5, 1986). The Department's rental rates charged for linear pipeline rights-of-way came under attack before this Board by natural gas pipeline operators in a series of appeals culminating in Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204 (1984), a decision which limited the ability of BLM to set linear pipeline right-of-way rental rates until it had adopted a uniform appraisal method for such rights-of-way. Id. at 212. Following the Northwest decision, BLM issued Instruction Memorandum (IM), No. 84-490, Change 1, dated Nov. 28, 1984, which instructed all BLM offices, pending approval of regulations implementing a uniform system of appraisal for all types of linear rights-of-way, to limit charges for new rights-of-way to a fixed rental. The IM states:

> Accordingly, during the interim period while developing new regulations, Instruction Memorandum No. 84-490 is revised and the following procedures are implemented.
>
> 1. Applicants for new rights-of-way should be charged the minimum rental of $25 for 5 years. The grant is to be made subject to a rental determination at a later date and the express covenant that any additional rental that

1/ BLM's decision incorrectly provided for the right of appeal. The decision was interlocutory in nature because it required that a condition be satisfied (payment of rental and the monitoring fee) prior to any adverse action (rejection of the application). See J-O'B Operating Co., 97 IBLA 89 (1987). Although appellant's appeal was, therefore, premature, we will consider in on its merits, rather than remanding the case to BLM. See Beard Oil Co., 97 IBLA 66, 68 (1987).

> is determined to be due as the result of the rental determination shall be paid upon request.

Although proposed regulations establishing a uniform system for appraisal for rights-of-way were published on September 5, 1986, 51 FR 31886, the Department has yet to publish final rules on the subject. As a consequence, the "interim period" spoken of by the IM quoted above continues, and, accordingly, BLM was not authorized to charge appellant $375 for the road right-of-way proposed to be issued here. (See, e.g. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262, 279 (1982), for the proposition that Instruction Memoranda are binding upon BLM offices.) There is, however, an even more basic question raised by this appeal than an overcharge of the rental due, which is whether any rental may be charged at all.

[2] Appellant raises an additional question concerning the nature of this road itself when, in his statement of reasons on appeal he states: "The road is existing. In fact there are presently three separate routes of access which have been in existence and use since the 1930's. * * * I would estimate that the present road is used by an average of fifty cars per day." Commenting upon this same matter, in a letter dated March 27, 1984, from the BLM Area Manager to appellant, the Area Manager states "However, we see no reason why the right-of-way will not be granted because the road already exists on the land and has been used for many years."

These statements by both BLM and appellant indicate that neither has considered the legal status of the road which is the subject of this appeal. It appears possible that no right-of-way is needed for this road, which may be a public road established under provision of Section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2793, effective October 21, 1976. Although this statute, commonly referred to as R.S. 2477, is no longer in effect, valid existing rights established under R.S. 2477 prior to October 21, 1976, were preserved by section 701(a) of FLPMA.

R.S. 2477 provides that: "The right of way for construction of highways over public lands, not reserved for public uses, is hereby granted." While ordinarily the determination whether an R.S. 2477 road is a public highway is left to the state courts (see Alfred E. Koenig, A-30139 (Nov. 25, 1964)), there are circumstances where adjudication by the Department of a question concerning an R.S. 2477 right-of-way is proper. In Leo Titus, Sr., 89 IBLA 323, 92 I.D. 578 (1985), we described the exceptional case where adjudication of this question would be necessary:

> An exception to this rule was developed by the decisions in Nick DiRe, 55 IBLA 151 (1981), and Homer D. Meeds, 26 IBLA 281, 83 I.D. 315 (1976). The purpose of this exception, as explained in DiRe and Meeds, was to permit BLM to make determinations respecting R.S. 2477 rights-of-way in cases where a determination would be helpful in the administration of the public lands. In Meeds, the Board concluded BLM adjudication of the possible existence of such a right-of-way was necessary where a road closure proposed by BLM was protested because the

road was claimed to be a public road established under R.S. 2477. The Board agreed this case was a special circumstance of "administrative concern" which could justify the effort and difficulty necessarily involved in making a determination normally reserved to the state courts because "it is appropriate that the Bureau review the propriety of its actions for its own purpose * * *." Id. at 26 IBLA 298-99, 83 I.D. at 323. (Emphasis supplied.) The Board was careful, however, to point out this exception was to be limited in application, and would not extend to cases involving private claims. This exception for purposes of administrative necessity was again applied in Nick DiRe to the situation where an application was made for a private road right-of-way across an existing trail said to be an R.S. 2477 road. Relying upon the "administrative concern" exception created by Meeds, the DiRe Board concluded adjudication of the R.S. 2477 issue in the case was proper, stating:

> Therefore, while the question of the existence of a "public highway" is ultimately a matter for state courts, BLM is not precluded from deciding the issue where it is considering an application for a private access road right-of-way, under section 501 of FLPMA, supra. The potential conflict is properly a matter of administrative concern.

Id. at 89 IBLA at 338, 92 I.D. at 587. It appears that this case fits into the described exception to the general rule, and that BLM should inquire into whether the road right-of-way applied for in this case is a public highway by operation of R.S. 2477. If, as both appellant and the Area Manager state, the road has been subject to public usage since the 30's, state law (in this case, California law) should be looked to in order to determine whether the road is in fact and law already a public highway. See Leo Titus, supra. If it is, there is no reason why appellant should be charged fees by BLM for maintenance or use.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated. The casefile is remanded to BLM for further fact-finding and action in conformity to this opinion.

Franklin D. Arness
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Bruce R. Harris
Administrative Judge